NAGASARI UNGGUL SDN BHD v. TEE CHEE HONG

HIGH COURT MALAYA, SHAH ALAM
WONG KIAN KHEONG J
[CIVIL APPEAL NO: BA-12BNCVC-9-02-2018]
19 FEBRUARY 2019

CONTRACT: *Agreement – Validity – Contract to provide service – Dispute as to existence of agreement – Whether contract could exist when invoice issued before issuance of purchase order – Whether constituted 'proposal' and 'acceptance' within s. 2(a) and (b) of Contracts Act 1950 – Whether agreement concluded before issuance of invoices – Whether failure to deny allegation of indebtedness amounted to admission – Whether party receiving benefit of services estopped from denying existence of agreement*

STATUTORY INTERPRETATION: *'Proposal' and 'acceptance' – Section 2(a) and (b) of Contracts Act 1950 – Whether 'proposal' in s. 2(a) requires proposal by an offeror to be in form of a purchase order or in any other particular form – Whether 'acceptance' in s. 2(b) states that purchase order can only be accepted by way of an invoice – Literal meaning – Whether wide – Whether narrow construction would cause uncertainty in commercial transaction*

The plaintiff and the defendant entered into an agreement for the plaintiff to supply manpower to the defendant on the terms, *inter alia*: (i) the plaintiff would provide manpower services to the defendant for two projects ('services'); and (ii) there was an 'understanding' between the plaintiff and defendant for the services to be first provided by the plaintiff and only then, the plaintiff would issue an invoice. Upon the receipt of the invoice, the defendant would issue a purchase order ('PO'). The plaintiff, having provided the services, issued 12 invoices to the defendant for a total sum of RM306,766.59 ('outstanding sum'). In return, the defendant issued 12 POs to the plaintiff and with regard to two of the invoices, the defendant made a part payment of RM44,565.53. The defendant also issued a payment voucher regarding the part payment. Subsequently, the plaintiff filed an action in the Sessions Court ('original action') to recover the balance of the outstanding sum after deducting the part payment, whilst the defendant counterclaimed against the plaintiff for the part payment. It was the defendant's contention that the part payment made to a third party, Anggun Holding Sdn Bhd ('AH'), was due to a mistake. The original action was allowed by the Sessions Court Judge ('SCJ') and the defendant was ordered to pay a sum of RM262,201.96 ('judgment sum') and the defendant's counterclaim was dismissed. Hence, the defendant's appeal herein which raised the questions (i) whether there was an agreement between the plaintiff and defendant for the plaintiff to supply manpower to the defendant when

A invoices were first issued by the plaintiff before the issuance of the defendant's POs; and (ii) whether the defendant was estopped by its conduct from denying the existence of the agreement. This issue also concerned whether the defendant had erroneously made a part payment. The issue herein was concerned with the interpretation of the definitions of 'proposal' B and 'acceptance' in s. 2(a) and (b) of the Contracts Act 1950 ('CA') respectively.

Held (dismissing appeal with costs):

(1) There was no written contract between the plaintiff and the defendant. The definition of 'proposal' in s. 2(a) of the CA does not require a C proposal by an offeror to be in the form of a PO or in any other particular form. Nor does the definition of 'acceptance' in s. 2(b) of the CA state that a PO can only be accepted by way of an invoice. The literal meaning of the definitions of 'proposal' and 'acceptance' in s. 2(a) and (b) of the CA is wide and does not support a restrictive D interpretation. Furthermore, the CA is a general statute which applies to all contracts. Any narrow construction of the definitions of 'proposal' and 'acceptance' in s. 2(a) and (b) of the CA does not facilitate trade and commerce and may cause uncertainty in commercial transactions. (paras 18 & 19)

E **(2)** The plaintiff had signified to the defendant of the plaintiff's willingness to provide the services before the issuance of the 12 invoices and the defendant had signified his assent to the proposal. Hence, the agreement had been concluded even before the issuance of the 12 invoices by the plaintiff. The 12 invoices and the 12 POs did not constitute a 'proposal' F and 'acceptance' within the meaning of s. 2(a) and (b) of the CA respectively. (para 21)

(3) The plaintiff had demanded the defendant to pay the judgment sum, which the defendant did not reply to, let alone deny. In a commercial relationship, the failure to deny allegation of indebtedness may amount G to an admission. Further, the plaintiff had sent a 'statement of account' to the defendant stating, among others (i) details regarding the outstanding sum, part payment and judgment sum; and (ii) to notify plaintiff, in writing, of any discrepancy in the statement within ten days. However, the defendant failed to do so and neither did the defendant H deny the plaintiff's statement of account at any time. The defendant was thus estopped from denying the existence of the agreement and the fact that the judgment sum due from the defendant to the plaintiff. (para 22)

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(4) If the defendant had indeed paid for the services by paying AH, there was no reason why the defendant could not have instituted a third party proceedings against AH for an indemnity. There was lack of credibility and *bona fides* when the defendant put forward two conflicting defences, *ie*, that the defendant did not enter into the agreement regarding the services and that the defendant had paid AH for the services. There was no basis to accept that the defendant had mistakenly made the part payment. Furthermore, the defendant only counterclaimed that the part payment was made erroneously after the filing of the original action. It was thus clear that the counterclaim was an afterthought with the sole purpose of stifling the original action. (paras 22 & 23)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

CFB Aluminium Extrusion Sdn Bhd v. Lim Soon Seng [2014] 1 LNS 1311 HC ***(refd)***

David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Jetara Sdn Bhd v. Maju Holdings Sdn Bhd [2007] 3 CLJ 41 CA ***(refd)***

Tan Ah Kow & Anor v. Tan Chaui En [2018] 2 CLJ 610 CA ***(refd)***

TH Heavy Engineering Bhd v. Daba Holdings (M) Sdn Bhd [2017] 1 LNS 1570 HC ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Wasco Lindung Sdn Bhd v. Lustre Metals & Minerals Sdn Bhd [2015] 2 CLJ 427 HC ***(refd)***

Windsor Aims Construction Sdn Bhd v. MNQ Builders Sdn Bhd & Ors [2017] 1 LNS 1781 HC ***(refd)***

Zi Productions Sdn Bhd v. SACC Convec Sdn Bhd [2017] 1 LNS 405 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 2(a), (b)
Courts of Judicature Act 1964, s. 27
Evidence Act 1950, ss. 8(2), 115
Rules of Court 2012, O. 16 r. 1(1)(a), O. 55 rr. 2, 3

For the appellant - Rusdy Ishak; M/s Lim & Yeoh
For the respondent - Ishraf Hakim Mohd Nadzri; M/s G Ragumaren & Co

Reported by S Barathi

JUDGMENT

Wong Kian Kheong J:

Background

[1] This appeal raises a novel question of whether there can be a contract to provide services when an invoice is issued by a party providing the services before the issuance of a purchase order (PO) by the party who receives the benefit of the services. This issue concerns an interpretation of the definitions of "proposal" and "acceptance" in s. 2(a) and (b) of the Contracts Act 1950 (CA) respectively.

[2] The respondent (plaintiff) has filed a claim (original action) in the Sessions Court (SC) against the appellant company (defendant). I will refer to parties in this judgment as they were in the SC.

[3] The defendant has filed a counterclaim against the plaintiff (counterclaim).

[4] The learned SC Judge (SCJ) has:

(i) allowed the original action with the following orders:

(a) the defendant shall pay a sum of RM262,201.96 (judgment sum) to the plaintiff;

(b) the defendant shall pay to the plaintiff interest at the rate of 5% per annum on the judgment sum from the date of filing of the original action until the date of full payment of the judgment sum; and

(c) the defendant shall pay costs of RM10,058 to the plaintiff; and

(ii) dismissed the counterclaim with costs of RM841. (SCJ's decision).

[5] This is the defendant's appeal to the High Court against SCJ's decision (this appeal).

Issues

[6] This appeal raises the following two questions:

(i) whether there was an agreement between the plaintiff and defendant for the plaintiff to supply manpower to the defendant when invoices were first issued by the plaintiff before the issuance of the defendant's PO's; and

(ii) whether the defendant is estopped by its conduct from denying the existence of the agreement. This issue also concerns whether the defendant has erroneously made a part payment to the plaintiff.

Plaintiff's Case

[7] The plaintiff is the sole proprietor of Hong Jaya Engineering Works. The plaintiff testified as follows, among others:

(i) there was an agreement between the plaintiff and defendant for the plaintiff to supply manpower to the defendant (agreement) in the following manner:

(a) the plaintiff would provide manpower services to the defendant for two projects, "BF Plant Project" and "Sinter Project" (two projects) from May until October 2015 (services); and

(b) there was an "understanding" between the plaintiff and defendant for the services to be first provided by the plaintiff and only then, the plaintiff would issue an invoice. After the defendant had received the invoice, the defendant would issue a PO;

(ii) after the plaintiff had provided the services, the plaintiff issued 12 invoices (dated 31 May 2015 to 31 October 2015) to the defendant (12 invoices) for a total sum of RM306,766.59 (outstanding sum). Attached to the 12 invoices are detailed records regarding, among others, the time periods for the rendering of services for the two projects (attachments to invoices);

(iii) after the defendant received the 12 invoices, the defendant issued 12 POs (all dated 1 April 2016) to the plaintiff (12 POs) regarding the outstanding sum; and

(iv) regarding two of the 12 invoices, the defendant made a part payment of RM44,565.53 (part payment) by way of the defendant's cheque dated 20 April 2016 (defendant's cheque). The defendant issued a payment voucher dated 20 April 2016 regarding the part payment (PV).

[8] Ms. Gan Poh Wei (SP2) is the plaintiff's wife and assistant. SP2 has a diploma in accounting. The 12 invoices and their attachments were prepared by SP2.

[9] The original action has been filed to recover the judgment sum (the balance of the outstanding sum after deducting the part payment).

Defendant's Case

[10] Mr. Chong Fu Seong (SD1) is the defendant's Managing Director. SD1 is the plaintiff's brother-in-law and SP2 is SD1's sister. According to SD1, among others:

(i) the defendant had been appointed by Eastern Steel Sdn. Bhd. (ES) to do the "internal handling" of the two projects (work);

(ii) the defendant then entered into a joint venture agreement with Anggun Holding Sdn. Bhd. (AH) wherein:

(a) the defendant would provide the equipment and machinery for AH to do the work; and

(b) AH would submit claims to the defendant regarding the work done by AH. The defendant would then submit the "total production sales" to ES. The profit derived from these sales (JV profit) would be divided between AH and the defendant according to an agreed calculation;

(iii) the three directors and shareholders of AH are the plaintiff, SP2 and Mr. Gan Son Hock (Mr. Gan). Mr. Gan is the plaintiff's father-in-law;

(iv) the defendant adduced at the trial in the SC the following evidence:

(a) invoices, delivery orders, statements of workers' salaries and claim forms issued by AH to the defendant (AH's documents); and

(b) summary reports regarding the calculation of the JV profit;

(v) the defendant did not agree for the plaintiff to supply labour for the two projects; and

(vi) SD1 had signed the 12 POs, PV and the defendant's cheque on behalf of the defendant by mistake because:

(a) SD1 signs many PO's, PV's and cheques daily; and

(b) SD1 "did not think much" when he signed the 12 POs, PV and the defendant's cheque as the plaintiff is SD1's brother-in-law.

[11] Mr. Tee Jiun Leong (SD2) is the defendant's accounts manager. SD2 had prepared the 12 POs, PV and the defendant's cheque because of the insistence of the plaintiff as SD1's brother-in-law.

[12] The counterclaim sought for the plaintiff to refund the part payment to the defendant.

SCJ's Decision

[13] The SCJ's decision is based on the following grounds:

(i) as admitted by SD1, AH's documents did not concern the supply of manpower;

(ii) the PO's constituted an offer from the defendant for the services to be provided by the plaintiff. After the plaintiff had provided the services, invoices were issued by the plaintiff to the defendant;

(iii) the existence of the agreement was proven by the PO's and invoices;

(iv) the defendant's contention that the part payment was due to a mistake (as the defendant had paid AH), was an afterthought because:

(a) the 12 POs were issued to the plaintiff and not AH;

(b) the defendant did not withdraw the 12 POs; and

(c) the defendant issued the PV and made the part payment. The defendant did not retract the PV;

(v) regarding the defendant's submission that the 12 invoices had been issued before the 12 POs, the learned SCJ considered the family relationship between the plaintiff and SD1 and gave allowance to the "loose" documentation in respect of the agreement. Furthermore, the plaintiff and defendant had the freedom regarding the execution of the agreement and its documentation;

(vi) the SC did not accept SD1's allegation that the stamp on the 12 invoices was not the defendant's because:

(a) such an allegation was not pleaded in the defence and counterclaim and was only raised for the very first time when SD1 testified in SC;

(b) this allegation was made to enable the defendant to evade liability to the plaintiff under the agreement;

(c) SD1 has admitted that the defendant possesses more than one stamp;

(d) SD2 had been given the 12 invoices by the plaintiff and could have detected whether the defendant's stamps on the 12 invoices had been forged; and

(vii) the learned SCJ rejected the defendant's contention that the part payment had been made in haste because the defendant had about one month to verify the plaintiff's claim for the outstanding sum before the defendant issued the PV. Hence, the SC dismissed the counterclaim.

Judicial Approach

[14] The High Court has jurisdiction to hear appeals after trials from subordinate courts pursuant to s. 27 of the Courts of Judicature Act 1964 read with O. 55 rr. 2 and 3 of the Rules of Court 2012 (RC).

[15] As the High Court has no audio-visual advantage:

(i) to listen to the oral evidence of witnesses given in the lower courts; and

(ii) to assess the demeanour of witnesses

- as a general rule, the High Court shall not intervene regarding the trial court's findings of fact, especially regarding their findings regarding the credibility of witnesses, unless there is a plain error of fact by the trial court which has caused an injustice and warrants appellate intervention – please see the judgment of Steve Shim CJ (Sabah & Sarawak) in the Federal Court case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, at 317-321.

A **Whether PO Must Precede Invoice**

[16] The defendant contends that the learned SCJ has erred in finding that the agreement exists based on the PO's and invoices. According to the defendant's learned counsel, the agreement could not exist as the PO's were only issued after the invoices. Reliance has been placed on the following B decisions:

(i) the judgment of Yeoh Wee Siam J (as she then was) in the Court of Appeal case of *Tan Ah Kow & Anor v. Tan Chaui En* [2018] 2 CLJ 610; [2017] 6 MLJ 297, at para. [26];

C (ii) Zalita Zaidan JC's judgment in *Zi Productions Sdn Bhd v. SACC Convec Sdn Bhd* [2017] 1 LNS 405; [2017] MLJU 945, at para. [40];

(iii) the decisions of Lim Chong Fong J in:

(a) *Windsor Aims Construction Sdn Bhd v. Mnq Builders Sdn Bhd & Ors* [2017] 1 LNS 1781; [2017] MLJU 2039, at para. [42]; and D

(b) *CFB Aluminium Extrusion Sdn Bhd v. Lim Soon Seng* [2014] 1 LNS 1311, at paras. [16] and [17]; and

(iv) Khadijah Idris JC's decision in *TH Heavy Engineering Bhd v. Daba Holdings (M) Sdn Bhd* [2017] 1 LNS 1570; [2018] 7 MLJ 1, at para. [27]. E

[17] Section 2(a) and (b) CA provide as follows:

> *Interpretation*
>
> s. 2 *In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:* F
>
> (a) *when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal;*
>
> (b) *when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise;* G
>
> (emphasis added).

[18] Firstly, there was no written contract between the plaintiff and defendant in this case. In *Wasco Lindung Sdn Bhd v. Lustre Metals & Minerals Sdn Bhd* [2015] 2 CLJ 427; [2015] 9 MLJ 610, at para. [13], I have decided as follows: H

> 13. *The lack of a written contract in this case means that it is incumbent on this court to consider all the documents to ascertain whether there is a contract of sale of aluminium ingots. I rely on the judgment of Ismail Khan CJ (Borneo) in the Federal Court case of Lau Sieng Nguong v. Hap Shing Co Ltd [1969] 1 MLJ 190, at 192, as follows:* I

> *It is clear law that where a contract is to be deduced from a set of documents it is necessary to look into the whole of the correspondence between the parties to see if the parties have come to a binding agreement (see Hussey v. Horne Payne (1879) 4 App Cas 311, Bristol Cardiff and Swansea Aerated Bread Co v. Maggs (1890) 44 ChD 616, May v. Thomson (1882) 20 Ch D 705 723 and Lau Brothers & Co v. China Pacific Navigation Co Ltd [1965] 1 MLJ 1*).
>
> (emphasis added).

The above decision in *Wasco Lindung* has been affirmed by the Court of Appeal.

[19] The definition of "proposal" in s. 2(a) CA does not require a proposal by an offeror to be in the form of a PO or in any other particular form. Nor does the definition of "acceptance" in s. 2(b) CA state that a PO can only be accepted by way of an invoice. The literal meaning of the definitions of "proposal" and "acceptance" in s. 2(a) and (b) CA is wide and does not support a restrictive interpretation. Furthermore, the CA is a general statute which applies to all contracts. Any narrow construction of the definitions of "proposal" and "acceptance" in s. 2(a) and (b) CA does not facilitate trade and commerce and may cause uncertainty in commercial transactions.

[20] In deciding whether a contract has been concluded between the parties:

(i) the court has to ascertain whether there has been a "proposal" (defined in s. 2(a) CA) by one party which has been "accepted" by the other party (within the meaning of s. 2(b) CA). This is a question of fact dependent on:

  (a) the documents;

  (b) the conduct of parties;

  (c) oral evidence; and

  (d) all the surrounding circumstances of the case in question; and

(ii) decided cases on whether there are binding agreements or otherwise, cannot constitute binding precedents from the view point of the *stare decisis* doctrine because such cases are decided based on their particular facts. All the cases cited by the defendant concerned the particular evidence of those cases wherein the PO constituted an offer (as understood in s. 2(a) CA) and the invoice amounted to an acceptance of the PO (within the meaning of s. 2(b) CA).

[21] In this case, based on the plaintiff's testimony:

(i) the plaintiff had signified to the defendant the plaintiff's willingness to provide the services (within the meaning of s. 2(a) CA) before the issuance of the 12 invoices and 12 POs; and

(ii) the defendant had signified his assent to the above proposal by the plaintiff (as understood in s. 2(b) CA) before the issuance of the 12 invoices and 12 POs.

In other words, the agreement had been concluded (as explained above) even before the issuance of the 12 invoices by the plaintiff. In this case, the 12 invoices (their attachments) and 12 POs did not constitute a "proposal" and "acceptance" within the meaning of s. 2(a) and (b) CA respectively.

Did Agreement Exist?

[22] Sitting as an appellate judge, I find that there is no plain error of fact when the learned SCJ decided that the agreement had been concluded. This finding is supported by the following evidence and reasons (in addition to the SCJ's decision as elaborated in the above para. [13]):

(i) by a letter dated 4 October 2016, the plaintiff's solicitors had demanded the defendant to pay the judgment sum (plaintiff's demand). The defendant did not reply to, let alone deny, the plaintiff's demand. In a commercial relationship, when one business entity (X) alleges that another business entity (Y) owes X a sum of money, Y's failure to deny X's allegation may amount to an admission of Y's indebtedness to X. On this matter, I rely on the following two decisions of the Court of Appeal:

(a) Gopal Sri Ram JCA's (as he then was) judgment in *David Wong Hon Leong v. Noorazman Adnan* [1995] 4 CLJ 155, at 159; and

(b) the decision of Hasan Lah JCA (as he then was) in *Jetara Sdn Bhd v. Maju Holdings Sdn Bhd* [2007] 3 CLJ 41, at 55;

(ii) the plaintiff had sent a "statement of account" dated 30 June 2016 to the defendant (plaintiff's statement of account). The plaintiff's statement of account stated, among others, as follows:

(a) details regarding the outstanding sum, part payment and judgment sum; and

(b) "Any Discrepancy In This Statement Please Inform Us In Writing Within 10 Days".

The defendant failed to inform the plaintiff in writing within ten days from its receipt of the plaintiff's statement of account that the defendant did not owe any sum of money to the plaintiff. In fact, the defendant had not denied the plaintiff's statement of account at any time. A party's conduct is relevant under s. 8(2) of the Evidence Act 1950 (EA) – please see Chang Min Tat FJ's judgment in the Federal Court in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, at 234.

The defendant's omission to deny the plaintiff's statement of account estops it from denying the existence of the agreement and the fact that the judgment sum due from the defendant to the plaintiff. I apply the doctrine of equitable estoppel against the defendant based on the following:

(1) s. 115 EA which reads as follows:

> *When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.* (emphasis added); and

(2) the Federal Court's judgment delivered by Gopal Sri Ram JCA (as he then was) in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, at 294-295;

(iii) if the defendant had indeed paid for the services by paying AH, there was no reason why the defendant could not have instituted third party proceedings against AH in this case for an indemnity (in the event the original action is allowed against the defendant – please see O. 16 r. 1(1)(a) RC); and

(iv) the lack of credibility and *bona fides* on the part of the defendant's witnesses is clear when the defendant puts forward the following two conflicting defences:

(a) the defendant did not enter into the agreement regarding the services; and

(b) the defendant had paid AH for the services.

Whether Part Payment Was Made Erroneously

[23] As the learned SCJ had correctly decided that the agreement had been concluded (please see the above paras. [13] and [22]), there was no basis to accept that the defendant had mistakenly made the part payment. Furthermore, the defendant only counterclaimed that the part payment was made erroneously after the filing of the original action. It is thus clear that the counterclaim is an afterthought with the sole purpose of stifling the original action.

Conclusion

[24] Premised on the above evidence and reasons, this appeal is dismissed with costs.